No. 80-251

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE,
*Appellant,*

v.

ROBERT L. GOLDBERG, *et al.*,
*Appellees.*

**On Appeal from the United States District Court For the Eastern District of Pennsylvania**

## BRIEF OF AMICI CURIAE, CONGRESSMAN ROBERT W. KASTENMEIER, CONGRESSMAN DON EDWARDS AND SENATOR CARL LEVIN

DANIEL MARCUS
JUDITH BARRY WISH
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

*Counsel for Amici Curiae*

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## BRIEF OF AMICI CURIAE, CONGRESSMAN ROBERT W. KASTENMEIER, CONGRESSMAN DON EDWARDS AND SENATOR CARL LEVIN

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### INTEREST OF AMICI CURIAE

This brief *amici curiae* is filed in support of the position of appellees, Robert L. Goldberg, *et al.* It is accompanied by written consent of appellant and appellees.

These *amici curiae* are members of the United States Congress. As legislators, they have an important interest in ensuring that the integrity of the legislative process is maintained and in having their legislative decisions accurately represented. Specifically, as participants in the Congressional debate over the resumption of all-male draft registration in 1980—a central issue in this case—these *amici* have an interest in ensuring that Congressional action in that regard is not misunderstood.

## SUMMARY OF ARGUMENT

The three-judge district court correctly held that the male-only registration provisions of the Military Selective Service Act, 50 U.S.C. App. §§ 451 *et seq.*, invidiously discriminate between males and females in violation of the Due Process Clause of the Fifth Amendment, and are therefore void.

### I.

Legislative classification schemes which differentiate on the basis of sex will be struck down under the Due Process Clause unless the classification scheme is shown to be substantially related to some important government objective. The 1948 male-only draft registration provisions of the Military Selective Service Act ("MSSA") involve such a sex-based classification and thus must meet this "intermediate" review test. However, as the Government admitted and the district court found, women were not excluded from the registration process in order to achieve any important government interest, but rather because of the widespread view shared by Congress regarding the "proper place" of women in society. As such, the all-male registration provisions of the 1948 Act are not substantially related to an important government objective and therefore violate the Due Process Clause.

### II.

The Government cannot rely on the legislative history surrounding the appropriation of funds for resumption of the registration process in 1980 to find some legitimate government interest that might justify the exclusion of women from registration. To do so would run counter to the well-settled principle—recently upheld by this Court in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978)—that except in rare circumstances appropriations acts cannot repeal, amend or take the place of sub-

stantive legislation. This doctrine was designed to prevent modification or repeal of substantive or authorizing legislation in a way that Congress neither intended nor was aware of. The few cases in which courts have found repeal by implication have involved appropriations acts that affirmatively prohibited rather than permitted the spending of additional funds and were passed after extensive committee and floor debates in which the intent of Congress to repeal or amend the substantive statute was unambiguous.

The legislative history surrounding the appropriation of funds for resumption of draft registration in 1980 reveals that Congress did not intend at that time to repeal and reenact the MSSA for new and nondiscriminatory reasons. Rather, Congress simply appropriated funds for resumption of all-male draft registration, already authorized by the 1948 MSSA, and in the process provided some post-hoc legislative history to justify the admittedly discriminatory provisions of the MSSA. This Court should give no weight to such post-hoc rationalizations.

## ARGUMENT

### I. THE ALL-MALE REGISTRATION PROVISIONS OF THE MILITARY SELECTIVE SERVICE ACT OF 1948 ADMITTEDLY ARE NOT SUBSTANTIALLY RELATED TO ANY IMPORTANT GOVERNMENT INTEREST AND ARE THUS UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE.

The Due Process Clause of the Fifth Amendment, like the Equal Protection Clause of the Fourteenth Amendment, prohibits legislative classification schemes that invidiously discriminate between similarly situated groups. *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). In 1976, this Court

held in *Craig* v. *Boren*, 429 U.S. 190, 197 (1976), that gender-based legislation must be reviewed carefully—*i.e.*, on the basis of "intermediate" or "middle-level" review—and would be upheld only if the classification scheme were demonstrated to be substantially related to some important government objective. *Id.* at 197. *See Wengler* v. *Druggists Mut. Ins. Co.*, 100 S. Ct. 1540, 1546 (1980); *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 273 (1979). Moreover, the party defending the classification scheme bears the burden of establishing the important government interests to be served by it, and the degree to which the "sex-centered generalization actually comport[s] with fact" must be substantial. *Craig* v. *Boren*, 429 U.S. at 199.

The all-male registration provisions of the Military Selective Service Act, 50 U.S.C. App. §§ 451 *et seq.* (1976),[1] involve a sex-based classification and thus are subject to an intermediate or middle-level review by this

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[1] Section 3, 50 U.S.C. App. § 453, provides in part:

> "Except as otherwise provided in this title . . . it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder."

Section 4(a), 50 U.S.C. App. § 454(a), provides in part:

> "Except as otherwise provided in this title . . . every person required to register pursuant to section 3 of this title . . . who is between the ages of eighteen years and six months and twenty-six years, at the time fixed for his registration, or who attains the age of eighteen years and six months after having been required to register . . . shall be liable for training and service in the Armed Forces of the United States . . . ."

Court.[2] Accordingly, the Government must establish that the all-male registration process promotes some important government objective and that the exclusion of women is substantially related to achievement of that objective. However, as the Government admitted in the district court in this case,[3] the legislative history of the MSSA, enacted in 1948, reveals that no consideration was given to whether male-only registration for conscription was necessary to achieve any important interest, or was even sound:

> "[T]he question of inclusion or exclusion of females in or from registration or conscription is not explicitly considered in any way in any of the statutory history of the Military Selective Service Act, as amended, or of any predecessor conscription statute in the United States." Appellees' Motion to Affirm at 4-5, quoting from Plaintiffs' Requests For Admissions (Set No. 2).

Moreover, the district court reviewed other legislation related to military service and also enacted in 1948 to determine the state of mind of Congress toward women and concluded that "[w]hen the MSSA was adopted in 1948 an aura of male chauvinism permeated Congressional attitudes toward women in the military."[4] It was

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[2] The argument establishing that an intermediate level of review is appropriate in assessing the constitutionality of the all-male registration provisions of the MSSA is persuasively made in Appellees' Motion to Affirm at 23-36, and will not be repeated here.

[3] *Goldberg* v. *Rostker*, Civil Action No. 71-1480 (E.D. Pa., July 18, 1980) (A copy of this decision is reproduced in Appendix A of Appellant's Jurisdictional Statement; all page citations to the decision are to that Appendix.)

[4] Appellant's Jurisdictional Statement at 23a n.15. The court pointed out:

> "During the same year Congress adopted a statute known as the Womens Armed Services Integration Act, 5 U.S.C. § 627.

[Footnote continued on page 6]

this widespread view of the "proper place" of women—rather than any important government interest—which provided the basis for the all-male registration provisions in the MSSA. *Id.*

In hearings before the House Subcommittee on Military Personnel of the Committee on Armed Services on March 5, 1980, Deputy Assistant Attorney General Larry L. Simms confirmed that in enacting the all-male registration provisions of the MSSA Congress was motivated purely by impermissible discriminatory purposes:

> "The reason for [not relying upon the legislative history or the reasoning of Congress to defend the all-male registration provisions of the MSSA] is, to summarize *that legislative history, it is replete with —and unfortunately replete—only with the kind of sexual stereotypes and that kind of thinking that the Court has subsequently held will not support the constitutionality of a legislative act of Congress or of the state legislature.*" Joint Appendix at 220, quoting from the Hearings on National Service Legislation, Subcomm. on Military Personnel of the House Armed Services Comm., March 5, 1980 (emphasis added).

Moreover, the legislative history of the enacted revisions and amendments to the MSSA reveal a similar absence

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[4] [Continued]

An example from the Congressional Record-House, June 2, 1948, page 6970 is illustrative:

> 'MR. VANZANDT: That is correct. We have a similar nurses organization for the Navy.
>
> Let me point out the position of the enlisted man. There is not a member of the House Committee on Armed Services who has not received a telephone call or a call in person from enlisted men objecting to the idea of having to take orders from a WAVE officer. Put yourself in the position of an enlisted man and I am sure you will agree with them.'" *Id.*

of Congressional findings justifying the exclusion of women from the registration process.[5]

Since the Government admittedly is unable to meet its burden of establishing that the exclusion of women from the registration process is substantially related to some important government interest, the all-male registration provisions of the MSSA, as enacted in 1948 and as amended, clearly invidiously discriminate between males and females in violation of the Due Process Clause.

## II. CONGRESS DID NOT, BY APPROPRIATING FUNDS FOR RESUMPTION OF THE ALL-MALE REGISTRATION PROCESS IN 1980, REPEAL AND REENACT THE REGISTRATION PROVISIONS OF THE 1948 MILITARY SELECTIVE SERVICE ACT TO ACHIEVE SOME CONSTITUTIONALLY PERMISSIBLE PURPOSE.

In view of the admittedly discriminatory purposes underlying the all-male registration provisions in the MSSA, the government now seeks to rely exclusively on the legislative history surrounding resumption of the registration process in 1980 to find some legitimate government interest that might justify the exclusion of women from registration.[6] In essence, the Government's argument is

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[5] *See* Appellees' Motion to Affirm at 6, referring to the Record at 1713-14, ¶¶ 2, 4, 6.

[6] On February 12, 1980, President Carter recommended that Congress appropriate funds for a peacetime draft registration program and amend the MSSA to permit the inclusion of women in the proposed registration system, Presidential Recommendations for Selective Service Reform, H.R. Doc. No. 265, 96th Cong., 2d Sess. (1980). The House, on April 22, 1980, and the Senate on June 2, 1980, passed H.R.J. Res. 521, Pub. L. No. 96-282, 94 Stat. 552 (June 27, 1980), which provided for the transfer of $13.285 million from unobligated Air Force funds to the Selective Service System to permit resumption of the registration process under the 1948 MSSA provisions.

In addition, on March 5 and 19, 1980, hearings on the proposal to amend the MSSA were held before the Subcommittee on Military

that Congress, in the course of appropriating funds for registration of men in 1980, implicitly reconsidered and repealed the discriminatory registration provisions of the MSSA only to immediately reenact them in their same form but supported by new and allegedly nondiscriminatory purposes. Therefore, the Government contends, this Court should look to passage of H.R.J. Res. 521 and the defense appropriations act in 1980 and to their legislative history in order to determine that the MSSA's all-male registration provisions are substantially related to important government objectives and thus constitutional:

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Personnel of the House Committee on Armed Services and the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee. By a vote of eight to one, the House Subcommittee on Military Personnel tabled the proposed amendment (H.6569) on March 6, 1980. The Senate Subcommittee then rejected the amendment (S.2440) by a vote of five to one, and issued a Report on the Rejection of Legislation Requiring the Registration of Young Women Under the Military Selective Service Act, Cong. Rec. S6531 (daily ed. June 10, 1980).

Subsequently, the Senate Armed Services Committee rejected the pending proposal to amend the MSSA to include women by a vote of twelve to five, and adopted the Specific Findings of the Subcommittee on Manpower and Personnel in its report on the pending Department of Defense appropriations bill for FY 1981, S. Rep. No. 826, 96th Cong., 2d Sess. 156-61 (1980). The defense appropriations act contained its own Selective Service funding transfer provision to permit reinstitution of draft registration, even though it was unnecessary since the Senate had already passed H.R.J. Res. 521.

On August 13, 1980, after the district court in this case had invalidated the male-only draft registration provisions of the MSSA, the House and Senate Conference Committee reported out the defense appropriations act and adopted the Findings of the Senate Subcommittee in its own report, H. Conf. Rep. No. 1222, 96th Cong., 2d Sess. 104 (1980). Significantly, the Conference Committee reported that the Senate had receded from its registration funding transfer provision since the transfer had already been "enacted in another . . . law." The reference, of course, was to H.R.J. Res. 521.

> "In evaluating the basis for drafting only men, the district court correctly considered the extensive legislative history underlying Congress' recent decision against amending the draft provisions of the MSSA to include women. . . . [T]he findings and conclusions articulated by the Armed Services Committee were not offered merely as a rationalization for what Congress did in 1948. Rather, they were part of a comprehensive reexamination of the registration and draft issues in view of current military needs, and following lengthy hearings on the President's proposal to amend the Act and expand draft registration to include women. These findings culminated in the current defense [appropriations] act, Pub. L. No. 96-342, 94 Stat. 1077, which, in conjunction with H.R.J. Res. 521 (limiting the transfer of funds for registration to the amount necessary to register males), rejected the President's proposal to register women. See S. Conf. Rep. No. 96-895, 96th Cong., 2d Sess. 100 (1980). *This legislation thus essentially constitutes a reconsideration and reenactment of the gender-restricted draft registration, and it is therefore appropriate—indeed necessary—that its history be taken into account in evaluating the basis for that restriction.*" App. Br. at 28 n.25 (emphasis added).

The Government's argument is plainly wrong: As we show in section II.A. below, it runs counter to the well settled principle that except in rare circumstances appropriations acts cannot repeal, amend or take the place of substantive legislation. Moreover, as we show in section II.B., those rare circumstances are not present here. There is therefore no basis for concluding that Congress intended such a repeal and reenactment.

### A. Appropriations Acts Will Not, Absent Unusual Circumstances, Be Held To Have Repealed, Amended or Replaced Authorizing Legislation.

As this Court recently pointed out in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), repeals by implications are disfavored; and therefore, repeal or modification of a substantive statute will be held to have occurred only when the new statute and legislative history together manifest a clear intention on the part of Congress to do so. Moreover, "[t]he doctrine disfavoring repeals by implication . . . applies with even *greater* force when the claimed repeal rests solely on an Appropriation Act." *Id.* at 190 (emphasis in original).

The doctrine against repeal by implication—especially by implication from appropriations acts—was designed to prevent the modification or repeal of a substantive or authorizing statute in a way that Congress neither intended nor was even aware of. It is premised on the assumption that authorizing legislation and appropriations acts are fundamentally different,[7] and that legislators, concerned primarily with the costs of various items in an appropriations act, should not also be required and will not be presumed to have examined in detail all of the possible impacts of the numerous provisions in any appropriations act on related substantive legislation.[8] As this Court explained in *TVA* v. *Hill*:

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[7] Authorizing legislation is basic substantive legislation which provides authority to do some function or activity; an appropriation, on the other hand, merely permits the previously authorized function or activity to incur obligations up to the specified amount in the appropriations act. *Andrus* v. *Sierra Club*, 442 U.S. 347, 360-61 (1979).

[8] This Court noted in *Andrus* v. *Sierra Club*, 442 U.S. 347 (1979), that Congress has traditionally distinguished between legislation and appropriations in order " 'to assure that program and financial matters are considered independently of one another. This division of labor is intended to enable the Appropriations Committees to concentrate on financial issues and to prevent them from trespassing on substantive legislation' . . . ." *Id.* at 361.

> "We recognize that both substantive enactments and appropriations measures are 'Acts of Congress,' but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. . . . [T]his [would] lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation . . . ." 437 U.S. at 190.

A different rule would also flout the House and Senate rules which proscribe the amending of existing laws through appropriations acts.[9]

In *TVA* v. *Hill*, appellants argued that Congress, by continuing to appropriate funds for completion of the Tellico Dam after discovery of the snail darter, an endangered species, intended to and did repeal the Endangered Species Act—at least as to projects like the Tellico Dam. Otherwise, operation of the dam would have threatened the existence of the snail darter in violation of the Act. 437 U.S. at 189. In support of their argument,

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[9] 437 U.S. at 190. "House Rule XXI(2), for instance, specifically provides:

> 'No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works as are already in progress. *Nor shall any provision in any such bill or amendment thereto changing existing law be in order.*'

See also Standing Rules of the Senate, Rule 16.4." *Id.* at 191 (emphasis added).

appellants noted that in appropriations committee hearings in 1975, 1976 and 1977, TVA discussed discovery of the snail darter and the relevance of the Endangered Species Act to the project, and asserted that "the Act did not prohibit the completion of a project authorized, funded, and substantially constructed before the Act was passed." *Id.* at 163. Moreover, the appropriations committees in the House and Senate adopted this view and explicitly stated their intention to repeal or amend the Endangered Species Act if necessary so that at least the Tellico Project could be completed. *Id.* at 165, 167, 170-171. Indeed, the Senate Appropriations Committee in 1977—after the Sixth Circuit had enjoined further construction of the Tellico Dam because it violated the Act—explicitly recommended the appropriation of funds and, if necessary, repeal of the Endangered Species Act to allow for completion of the dam:

> " 'This committee has not viewed the Endangered Species Act as preventing the completion and use of these projects which were well under way at the time the affected species were listed as endangered. *If the act has such an effect*, which is contrary to the Committee's understanding of the intent of Congress in enacting the Endangered Species Act, *funds should be appropriated to allow these projects to be completed and their benefits realized in the public interest, the Endangered Species Act notwithstanding.*' S. Rep. No. 95-301, p. 99 (1977)." *Id* at 171 (emphasis added).[10]

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[10] The House Appropriations Committee in 1977 also recommended repeal of the Act if necessary:

> " 'It is the Committee's view that the Endangered Species Act was not intended to halt projects such as these in their advanced stage of completion, and [the Committee] strongly recommends that these projects not be stopped because of misuse of the Act.' Report of the House Comm. on Appropriations, H.R. Rep. No. 379, 95th Cong., 1st Sess. 104 (1977)." *Id.* at 170.

Finally, appellants urged, the fact that TVA's budget—including funds for Tellico Dam—was passed by Congress on the recommendation of the House and Senate Appropriations Committees constituted further evidence that Congress had clearly intended to repeal the Endangered Species Act, at least insofar as it prevented completion of projects such as the Tellico Dam.

Despite such evidence, this Court was not persuaded that Congress as a whole was aware of the impact of this one provision of the complex appropriations act on the Endangered Species Act, or intended by appropriating funds for continuation of Tellico Dam to repeal portions of that Act. Although the Court recognized that "Appropriations Committees [had] expressly stated their 'understanding' that the earlier legislation would not prohibit [completion of the dam]," it pointed out that "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress . . . ." *Id.* at 191. The committee reports were contradicted by the fact that "[t]here is nothing in the appropriations measures, as passed, which states that the Tellico Project was to be completed irrespective of the requirements of the Endangered Species Act." *Id.* at 189. Moreover, "there is no indication that Congress as a whole was aware" of the appropriations committees' position. *Id.* at 192. Thus, the Court concluded, the statements in the committee reports " 'represent only the personal views of these legislators,' and 'however explicit, [they] cannot serve to change the legislative intent of Congress expressed before the Act's passage.' " *Id.* at 193.

Lower federal courts similarly enforce the doctrine against repeal by implication and hold that except in rare circumstances appropriations acts will not be assumed to amend, repeal or take the place of substantive legislation. Thus, in *Environmental Defense Fund, Inc.*

v. *Froehlke*, 473 F.2d 346 (8th Cir. 1972), appellees claimed, *inter alia*, that while courts generally can review substantive agency decisions on the merits to determine whether they comply with the National Environmental Policy Act of 1969 ("NEPA"), such review was not proper where Congress appropriated funds for the project after an environmental impact statement had been filed, since notwithstanding the NEPA provisions, "the decision of Congress to fund the project . . . makes the decision to complete [it] a Congressional one not subject to review by the courts." *Id.* at 353.

The Eighth Circuit disagreed, concluding that NEPA required construction projects be completed in accordance with its substantive provisions and "[a]n appropriation act cannot serve as a vehicle to change that requirement." *Id.* at 353-54. Under both the House rules and the doctrine against repeal by implication, "legislators voting for bills appropriating funds for this project had the right to assume that the project would be carried out in accordance with the substantive provisions of NEPA." *Id.* at 355. The court concluded:

> "We simply hold that an appropriation act cannot change the requirements of NEPA. We recognize that Congress has the right to *authorize* projects and to exempt them from the provisions of NEPA, but Congress did not take such action here. No new authorization bill was passed after NEPA was enacted. The only authorization for the project was voted years before NEPA was passed." *Id.* (emphasis in original).[11]

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[11] *Accord, Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 149 U.S. App. D.C. 380, 463 F.2d 783 (1971) (passage by Congress of appropriations bills for test of nuclear warhead did not effectively repeal NEPA by conclusively determining the sufficiency of the environmental impact statement which the Commission was required by NEPA to issue).

Again, in *Libby Rod & Gun Club* v. *Poteat*, 457 F. Supp. 1177 (D. Mont. 1978), the defendants claimed that construction of a dam on the Kootenai River in Montana by the Corps of Engineers had been authorized by general provisions in several substantive statutes and, if not, then by successive appropriations acts which provided funds for the water development projects along the river. The court, quoting *Hill*, rejected the authorization-by-appropriations argument and concluded that "precedent clearly determines that appropriation cannot be equated with authorization." *Id.* at 1184.

The few cases in which an appropriations act has been held to impliedly repeal or amend substantive or authorizing legislation are clearly distinguishable. First, they involved appropriations acts which prohibited—rather than provided for—the spending of additional funds for some previously authorized activity or function. Second, since the prohibition of an activity generally involves a substantial affirmative act, such appropriations acts were also accompanied by considerable committee and floor debate in which the intent of Congress to repeal or modify a substantive statute was unmistakable.

Such was the case in *United States* v. *Dickerson*, 310 U.S. 554 (1940), which involved a 1922 statute authorizing the payment of bonuses to servicemen who re-enlisted. In 1938, Congress passed a rider to the appropriations bill for the Rural Electrification Administration providing:

> "'[N]o part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1938, shall be available for the payment' of any enlistment allowance for 're-enlistments made during the fiscal year ending June 30, 1938, notwithstanding the applicable portions of' [the 1922 Act]." *Id.* at 555.

The War Department's denial of re-enlistment bonuses to soldiers who claimed under the 1922 statute was sustained because the clear language of the 1938 appropriations act itself and the legislative history revealed a full and specific discussion of the appropriations act's repealing effect on the 1922 act. Moreover, the fact that the same provision was inserted in various appropriations acts for eight successive years was further evidence that Congress was aware of and intended the prohibition provision in the appropriations act to repeal the 1922 statute.

Similarly, in *Friends of the Earth* v. *Armstrong*, 485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974), the Tenth Circuit concluded that a 1962 appropriations act, which prohibited the use of any of the funds appropriated "'for construction or operation of facilities to prevent waters of Lake Powell [a reservoir created by the Glen Canyon Dam] from entering any National Monument,'" *id.* at 7, implicitly repealed a 1956 statutory provision expressly prohibiting waters of the reservoir from entering any national park or monument. In reaching its decision, the court relied on the "extensive and unambiguous legislative history of the 1962 appropriations act," contained in hearings and floor debates, and on the fact that twelve successive appropriations acts contained provisions similarly expressly prohibiting the use of any funds for construction of any protective works for the National Monument involved. *Id.* at 9.[12] While the court acknowledged the strong presumption against repeal by implication, it concluded:

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[12] In *Sierra Club* v. *Morton*, 400 F. Supp. 610, 638 n.42 (N.D. Calif. 1975), the court emphasized that in *Friends of the Earth* v. *Armstrong*, the intent of Congress to amend the substantive law was manifestly clear from both the language of the Act which expressly prohibited certain action required by an existing statute, and the legislative history. In such a case, courts will give effect to the intent of Congress, even if it is expressed in an appropriations act.

"[On the basis of the appropriations act and the legislative history,] [t]his is thus not really a situation of repeal by implication . . . but more a reversal of a previous position after considering it fully in the public hearings and after the members apparently came to the conclusion that the protective works would be more detrimental than the presence of water in the Monument. . . . This 'repeal,' if it should be called that, thus was straightforward, direct, and after hearings on the subject." *Id.* at 9.[13]

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[13] *Accord, City of Los Angeles* v. *Adams*, 181 U.S. App. D.C. 163, 556 F.2d 40 (1977). That case involved a 1970 statute that established an airport development program and authorized the Secretary of Transportation to make grants of "not less than" $250 million in each of the next five years. However, in FAA appropriations acts for those years, Congress appropriated amounts substantially less than that required under the act. Because the legislative history of the appropriations acts in each year clearly indicated that Congress was aware of and intended to appropriate less than the amount specified in the 1970 Act, the D.C. Circuit held that the appropriations acts had amended the expenditure authorization provision in the 1970 Act.

The Hyde Amendment cases present a clearly different issue, as this Court made clear last term in *Harris* v. *McRae*, 100 S. Ct. 2671 (1980). Beginning in 1976, Congress passed variations of the Hyde Amendment—prohibiting the use of appropriated federal funds for Medicaid abortions except in specified situations—as riders to the Health, Education and Welfare appropriations acts. But this Congressional action did not constitute an implied amendment of the underlying Medicaid Act, Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.* (1976). That statute is designed as a program of shared federal-state financial obligations, not of the federal government imposing financial burdens on the states. Therefore, when Congress made changes in the federal funding available for particular services under the Act, it automatically amended the Act and thus the state's obligation under it. Had Congress intended, by enacting the Hyde Amendments, to shift to the states the substantial burden of providing for the abortions required under the Act but for which federal funding had been withdrawn by the Hyde Amendments, it would have expressed its

**B. The Language of the Appropriations Act and the Legislative History Reveal No Unambiguous Intent by Congress To Affect in Any Way the 1948 Military Selective Service Act.**

Absent language in the appropriations act itself or clear evidence in the legislative history to overcome the presumption against implicit repeal of substantive statutes by appropriations acts, the Government's defense of the constitutionality of the all-male registration provisions of the MSSA collapses. As we show below, no such evidence that Congress in 1980 considered, much less intended to repeal and reenact the 1948 MSSA exists.

As in *TVA* v. *Hill*, the Government's argument here requires this Court to find that by passing an appropriations act Congress intended to substantially alter a substantive statute. In *Hill*, the alteration allegedly intended by Congress affected the scope of the Act's protection to endangered species; in this case the supposedly intended alteration goes to the purposes for which the all-male registration provisions of the MSSA were designed and thus affects their constitutionality under the Due Process Clause.

The policy reasons underlying the doctrine against repeal by implication, enumerated by this Court in *TVA*

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intention to do so in unambiguous terms. It did not. As this Court concluded,

> "Since Title XIX itself provides for variations in the required coverage of state Medicaid plans depending on changes in the availability of federal reimbursement, we need not inquire, as the District Court did, whether the Hyde Amendment is a substantive amendment to Title XIX. The present case is thus different from *TVA* v. *Hill*, 437 U.S. 153, 189-93 . . . , where the issue was whether continued appropriations for the Tellico Dam impliedly repealed the substantive requirements of the Endangered Species Act prohibiting the continued construction of the Dam because it threatened the natural habitat of an endangered species." *Id.* at 2684 n.14.

v. *Hill*, apply with equal vigor here. When Congress considers a proposal for a substantive statute, such as the Endangered Species Act or the Military Selective Service Act, the focus of the hearings and debates presumably is on such issues as whether and why the act is necessary; what objectives it will achieve; what its coverage ought to be; what exceptions will be allowed; and what if any impact it will have on other statutes. Thus, Congress is presumed in enacting authorization legislation to have fully considered the issues and to have intended to do what the statute purports to do. In passing appropriations acts, on the other hand, Congress is not required by its own rules nor could it consider all of the possible effects on substantive statutes of the numerous provisions in even a single appropriations act. Therefore, to avoid holding that a substantive statute has been modified or repealed in a way that Congress was neither aware of nor intended, courts will not find that a repeal or modification by an appropriations act has occurred absent a clear showing that Congress as a whole intended it.

An examination of the legislative history reveals that Congress did not intend by appropriating funds for resumption of the registration process in 1980, to repeal and reenact the MSSA for new and allegedly nondiscriminatory reasons. The smattering of statements hidden in the legislative history and cited by the Government are clearly inadequate to support a contrary conclusion.

On March 5 and 19, 1980, hearings on the President's proposal to amend the MSSA to permit inclusion of women in the draft registration system were held before the Subcommittee on Military Personnel of the House Committee on Armed Services and the Subcommittee on Manpower and Personnel of the Senate Armed Services Committee. By a vote of eight to one, the Military Personnel Subcommittee tabled the proposed amendment

(H.6569) on March 6, 1980. The Senate Subcommittee on Manpower and Personnel then rejected the amendment (S.2440) by a vote of five to one, and issued a Report on the Rejection of Legislation Requiring the Registration of Young Women Under the Military Selective Service Act, Cong. Rec. S6531 (daily ed. June 10, 1980). In spite of the fact that the Department of Justice, in testimony before the Senate Subcommittee, referred to this case—then before the district court—and implored the committee to provide a record that would justify the all-male registration provisions in the MSSA,[14]

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[14] Larry L. Simms, Deputy Assistant Attorney General, testified:

"Before doing so, I would like to note that that is a matter that is currently in litigation before a three judge Federal Court in Philadelphia, the specific issue of the constitutionality of an all male draft.

* * * * *

"In our analysis you will note that in support of the constitutionality of the all male draft we do not call on in any way the legislative history or reasoning of the Congress which in 1949 adopted the law which the Administration is presently urging be changed. The reason for that is very simple. In virtually all of the lower court cases which have reached a judgment on this issue, the legislative history of the 1949 Act has been totally unhelpful to the government in defending its constitutionality.

"The reason for that is, to summarize that legislative history, it is replete with—and unfortunately replete—only with the kind of sexual stereotypes and that kind of thinking that the Court has subsequently held will not support the constitutionality of a legislative act of Congress or of the state legislature.

* * * * *

"The issue is now back before Congress, and speaking solely for the Department of Justice as litigator, it should be fairly obvious to this committee that the defensibility of the all male draft is something which Congress perhaps should speak out clearly and formulate the kind of record if, indeed, it chooses to reject the Administration's proposal, which will be helpful rather than hurtful in the litigation." Joint Appendix at 218, 220-21.

the Subcommittee Report contains no recommendation that the registration provisions in the 1948 MSSA, as amended, ought to be repealed and reenacted on the basis of the new Findings made by the Subcommittee. Rather, it simply contains several pages of Findings which attempt to provide a post-hoc justification for the exclusion of women from draft registration.

Subsequently, the Senate Armed Services Committee reported out the Department of Defense Authorization for Appropriations for FY 1981, which included a provision for the transfer of funds for registration of men only. While the report specifically adopted the Findings of the Senate Subcommittee, S. Rep. No. 826, 96th Cong., 2d Sess. 156-61 (1980), these Findings and the provisions relating to the transfer of funds were superfluous; the House and Senate had already passed H.R.J. Res. 521 which provided for the transfer of funds for resumption of the all-male registration process. In addition, the House Conference Report on the defense appropriations act, H. Conf. Rep. No. 1222, 96th Cong., 2d Sess. 104 (1980), only appeared after the district court had struck down the registration provisions in the MSSA as unconstitutional, and apparently adopted the Findings of the Senate Subcommittee for the specific purpose of influencing this litigation.[15] There is no indication in either

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[15] As in the case of the Senate Armed Services Committee Report, the Conference Committee had no other reason to mention the issue of draft registration since funds had already been provided for it in H.R.J. Res. 521.

Moreover, it is significant under *TVA* v. *Hill* to note that in a 242 page Senate Armed Services Committee Report on the defense appropriations act, the statement rejecting the registration of women is tucked neatly in a few pages in the middle of the extensive report. And, in the 106 page House Conference Report, the only statement regarding women and registration appears on page 104 of the Report:

> "The conferees endorse the Specific Findings on registration of women contained in the Senate report."

lengthy and ponderous report that the committees were endorsing a repeal and reenactment of the all-male registration provisions of the MSSA for the new reasons stated in the Findings. Moreover, as this Court pointed out in *TVA* v. *Hill*, statements in committee reports " 'however explicit, . . . cannot serve to change the legislative intent of Congress expressed before the [Endangered Species] Act's passage.' " 437 U.S. at 193.[16]

A review of the debates in both the House and Senate on H.R.J. Res. 521, providing funds for resumption of registration, further refutes the Government's argument. Indeed, the debate in the House on April 22, 1980, consumed less than four hours and focused on whether resumption of premobilization registration was either necessary or an effective way of responding to several recent aggressive actions by Russia, including the invasion of Afghanistan.[17] Although an amendment to provide funds for the registration of women as well as men was intro-

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[16] Additional hearings on the "Judiciary Implications of Draft Registration—1980" were held on April 14 and May 22, 1980 by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary. While several Administration witnesses testified regarding the constitutionality of the all-male draft provisions of the MSSA, no one suggested that by appropriating funds for resumption of draft registration Congress would implicitly repeal and reenact the MSSA for nondiscriminatory reasons. *See, e.g.*, testimony of Dr. Bernard Rostker, Director of the Selective Service System, and Ezra H. Friedman, Office of Legislation of the Justice Department's Criminal Division, *Judiciary Implications of Draft Registration—1980: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. (April 14 and May 22, 1980).

[17] Cong. Rec. H2704-2753 (daily ed. April 22, 1980); S6331 (daily ed. June 5, 1980) ("The House of Representatives spent only 1 day. That means they spent about 2 or 3 hours debating this resolution before they approved it.").

duced during the debate,[18] it was quickly rejected since there was no authority in the MSSA to register women and the only issue before the House was whether funds ought to be appropriated to resume the registration process authorized under the statute.[19]

As in the House, the debates in the Senate, which consumed nearly a week in June, 1980, centered on whether there was any advantage—real or psychological—to be gained from resumption of premobilization registration under the MSSA, and whether it was worth the financial and social costs.[20] Again, there was no discussion of whether changes in any aspect of the authorizing legislation were necessary in order to assure the constitutionality of the all-male registration process. Rather, the debates made clear that the Senators assumed that authority to resume registration existed in the MSSA and the only issue under consideration at that time was whether funds should be appropriated to enable the President to resume the exercise of that authority. Thus, Senator Dole pointed out:

> "The President already has the statutory authority to reinstitute registration for males between the

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[18] Cong. Rec. H2728 (daily ed. April 22, 1980):

> "Mr. Duncan of Oregon: Mr. Chairman this is an amendment to the amendment that is offered in order to present to the Congress the entire program which the President has requested of this Congress. It is to appropriate a sufficient amount of money to initiate a draft registration, not only for men, but also for women."

[19] *See, e.g.*, Cong. Rec. H2729, H2730, H2743 (daily ed. April 22, 1980). Thus Congressman Montgomery stated: "[T]he Duncan amendment, even if it were adopted today could not be implemented by the president, because there is no authorization for women to be registered. . . . Therefore, it is out of order." Cong. Rec. H2729.

[20] *See* Cong. Rec. S6227-6250 (daily ed. June 4, 1980); S6314-6339 (daily ed. June 5, 1980); S6392-6398 (daily ed. June 6, 1980); S6461-6486 (daily ed. June 9, 1980); S6506-6555 (daily ed. June 10. 1980); S6557-6611 (daily ed. June 11, 1980); S6736-6773 (daily ed. June 12, 1980).

> ages of 18 and 26. He has only to come to the Congress for the appropriations needed to begin the male registration procedure. The registration section of the Military Selective Service Act, suspended for the past few years, is the source of the President's authority." Cong. Rec. S6319 (daily ed. June 5, 1980).

Even during the brief floor debate over the Kassebaum-Levin Amendment which would have limited the use of appropriated funds to registration of both men and women,[21] it is clear that the Senate was not aware of nor did it intend by appropriating funds for registration—with or without the amendment—to effect in any way the MSSA or the President's authority under that statute. Indeed, as Senator Nunn pointed out, if the amendment passed it would not have implicitly modified the MSSA to require the inclusion of women in the registration process; rather, Congress would have then had to enact specific legislation authorizing the registration of women. *See* Cong. Rec. S6544 (daily ed. June 10, 1980).

There is thus simply no basis in the legislative history for this Court to conclude that by appropriating funds for resumption of the all-male registration process authorized by the MSSA, Congress in fact reconsidered and repealed the discriminatory 1948 MSSA only to reenact it "in the blink of an eyelash" in its exact form but for new and allegedly nondiscriminatory reasons. Rather, in 1980 Congress simply appropriated funds for resumption of the all-male draft, authorized by the 1948 MSSA, as amended. Moreover, it provided, at the specific request of the Department of Justice, some post-hoc legislative history to justify the discriminatory provisions of the MSSA. This Court should, in assessing the constitutional adequacy of reasons for excluding women from the registration process under the 1948 MSSA, give no weight

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[21] Cong. Rec. S6527 (daily ed. June 10, 1980).

to such post-hoc rationalizations. *Craig* v. *Boren*, 429 U.S. 190, 199 n.7 (1976); *see* discussion in Appellees' Motion to Affirm at 36-37.

## CONCLUSION

For the reasons stated above, the judgment of the three-judge district court should be affirmed.

Respectfully submitted,

DANIEL MARCUS
JUDITH BARRY WISH
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

*Counsel for Amici Curiae*

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